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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JACOB JAMES KOBER, Defendant and Appellant.	A144771 (Alameda County Super. Ct. No. H-55113)

A jury convicted defendant Jacob James Kober of first degree murder and found that he personally and intentionally used a firearm causing death. (Pen. Code, §§ 187, subd. (a), 189, 12022.53, subd. (d).)[1] Defendant admitted a prior conviction for first degree residential burglary, a serious felony and strike. (§§ 459, 667, subds. (a)(1), (e)(1).) The court sentenced defendant to 80 years to life in prison.[2]

Defendant contends a jury instruction on a lying in wait theory of murder is unsupported by the evidence; that standard jury instructions on the alternative theory of premeditated murder failed to adequately state that provocation may negate the necessary elements of premeditation, deliberateness and willfulness, thus reducing a murder from first to second degree; and that the court erred in admitting evidence that the victim told a friend he thought defendant was going to shoot him. Defendant also claims the abstract of

[1] All further section references are to the Penal Code except as noted.

[2] The court imposed a 25 years to life term for first degree murder, doubled to 50 years to life due to defendant's strike prior. Added to this is a consecutive 25 years to life term for firearm use and a consecutive five-year term for the serious felony prior.

judgment must be corrected to reduce an improperly stated court facility fee and to add one day of custody credit.

We conclude that the lying in wait instruction was supported by the evidence; that the standard instructions on deliberate and premeditated murder are correct; and that the victim's statement was properly admitted. The claims concerning the fee and custody credit are well taken, as the Attorney General acknowledges. We shall direct the trial court to correct the abstract of judgment on the fee and credit award and otherwise affirm the judgment.

Statement of Facts

Evidence was presented that defendant shot to death Kenneth Robert Ogden on the night of December 28, 2012. Defendant and Ogden had been friends since 2002, when they attended high school together. A mutual friend at high school was Jessica Popeyus. Popeyus dated Ogden during their time in high school and continued the relationship "off and on" until 2011. Popeyus began dating defendant in late summer 2012.

In 2012, Popeyus was renting a bedroom in a Livermore house owned by Daniel Vierra. The house was located on a golf course in the Springtown neighborhood. It was a "party house" where people came to use drugs. Vierra, Popeyus and others "partied" together, smoking marijuana and methamphetamine. Around October 2012, defendant moved into the house where he shared a bedroom with Popeyus. Popeyus testified that their relationship was "rocky." Defendant accused Popeyus of having sex with other men, including Ogden. The couple fought several times a week. Vierra heard "[r]aised voices, banging and shuffles" and saw bruises on Popeyus. In mid-December, defendant shouted at Popeyus about receiving text messages from a man and Popeyus ran from the room crying. Defendant threatened Popeyus: "If you leave, I'll shoot you."

Defendant owned a firearm. Soon after defendant moved into Vierra's house, he told Vierra he had a gun and showed Vierra a revolver. Over the next couple months, Vierra saw defendant carrying the revolver a "couple times" or perhaps a "handful of times," placed in the front of his pants. At trial, a friend of defendant was asked how

many times he had seen defendant in possession of a revolver and the friend replied "I guess all the time."

Defendant was a drug dealer. Vierra testified that when a friend wanted to buy marijuana or methamphetamine he would "talk to" defendant and try to "hook up something." Defendant kept a list of people who owed him money for drugs, written on a mirror in the bedroom he shared with Popeyus. In December 2012, Ogden's name was on the mirror and "had $380 or $400 next to it." Defendant and Ogden quarreled over Ogden's drug debt. On December 21, defendant telephoned Ogden to ask for payment. Ogden promised to pay a "c-note" but the money was not paid.[3]

Other problems arose between the men. In the fall of 2012, Ogden and defendant would "hang out" together and were the "best of friends." But "tension" developed in the relationship and, by Christmas 2012, defendant would not let Popeyus see or talk to Ogden. Around December 26, Popeyus happened to meet Ogden at a department store. Ogden, who was drunk, tried to kiss Popeyus. Defendant learned of the incident and said he felt "disrespected" by Ogden's act. Defendant was also angry with Popeyus, believing she was "screwing around on him."

On December 28, 2012, the night of the shooting, Ogden and defendant spoke at length on the telephone. Ogden said he met a woman he was going to bring to defendant to buy drugs but she was "in a hurry" so went "somewhere else." Ogden also told defendant: "I said you and me might be fighting [and that] kinda scared her off." Ogden said he was about to pick up a pizza, then "I gotta go try to grab some money from somebody who owes me some money then I could stop by and say what's up to you real quick or whatever." Defendant made a reply that was unintelligible on the recording and Ogden responded "Well, uh, uh, I mean, if, if I come over there right now, fucking, I don't have to eat no pizza. I'll come over there right now and talk to you. It's not a problem." Ogden said, "I mean because -- pretty much there's a misunderstanding."

[3] Ogden had an app installed on his cell phone that recorded all conversations. Those recordings were recovered and portions admitted in evidence at trial.

Ogden also said "I don't owe you money" but, after defendant made a reply unintelligible on the recording, Ogden said "Eventually, you're gonna want your money."

The exchange continued. "Ogden: . . . I'm not trying to rip you off. [¶] Kober: (Unintelligible.) You're running around, you're running around with money (unintelligible). [¶] Ogden: And I didn't until you told me to fuck off the other day. But I had too [*sic*]. I told you [I] was gonna be shooting you fucking a couple c-notes. [¶] Kober: (Unintelligible.) [¶] Ogden: That's all I had. I'm supporting myself and I have a c-note for you. I'm going to shoot it to you. I'm going to shoot it to you each c-note. Bam, bam. That's how I was going to knock it down. I've been paying off my – you're the only one who's upset with me. [¶] Kober: I'm the only person that you didn't pay. [¶] Ogden: I know, well here's what happened. I already knew the mis- the uh (unintelligible) was going to start. [¶] Kober: I'll talk to you when I see you. [¶] Ogden: I understand that. Might as well get some talking off through the phone though, know what I'm saying? Cause uh . . . I already know how you are, and you already know how I am. [¶] Kober: (Unintelligible.) [¶] Ogden: Well I know, exactly. When you see me, we won't have nothing to talk about then, right?"

Ogden said he would get a ride to Springtown and the exchange continued. "Ogden: . . . I can't keep getting from you and paying you back a little bit of money and keep getting in the hole with you (unintelligible). So if I go through somebody else and get it for cheaper, I'll be able to pay back your money, no problem. Because I kept coming up to you and getting shit fronted, and not giving you money, so that's why – I branched off did my own thing, to actually make money, and not upset you showing up every day and not having for you. And with it to me, seems like . . . the respect level it doesn't make me wanna give you your money. But me being who I am, I'm not trying to rob you for your money, regardless. If you wanna fight, that's fine, I'll give you the money that you gave me, because that's not how I'm tryna get at you. [¶] Kober: I'm not gonna fight with you bro. [¶] Ogden: Well, it, it don't matter either way. It's just a fight. So if that's how you, know what I'm saying? Don't act like you feel any differently than how you feel. I'm fucking, I'm a sporadic mother fucker. If you owed me that type of

money . . . I'd probably want to fight you. . . . I didn't come at you disrespectfully. I'm not trying to rob you for your money, I told you. [¶] Kober: (Unintelligible.) [¶] Ogden: I lagged on your money, that's about it. [¶] Kober: Yeah but, you don't be disrespecting me (unintelligible). [¶] Ogden: Huh? [¶] Kober: You don't disrespect me. [¶] Ogden: Yeah, I know. [¶] Kober: You do. [¶] Ogden: I go out of my way not to disrespect you bro. I try – tried not to disrespect you. You're the one who (unintelligible). [¶] Kober: (unintelligible). [¶] Ogden: I'm going over, right. [¶] Kober: Alright. [¶] Ogden: Alright, late[r]."

Ogden was at his friend Gail Barham's house when he made the call to defendant. She testified that Ogden was "nervous" and "uptight" and left reluctantly, saying defendant "was going to shoot him, but he had to go deal with it." Ogden also said "he was going to be sleeping with the ducks" and "he wanted his kid to know that he was going to be sleeping with the ducks." Barham had heard a reference to ducks previously and understood the comment to refer to "the duck pond in Springtown."

Ogden arrived at Vierra's house around 8:30 p.m. Ogden greeted Vierra and Popeyus's brother in the living room, shaking hands and saying "What's up?" Ogden asked where defendant was and Popeyus's brother went to defendant's bedroom to tell him Ogden was at the house. Defendant came out of the bedroom. He did not say anything to Ogden but nodded then jerked his head to the side, gesturing toward the door leading to the backyard and the golf course beyond.

The house was 50 yards from the fourth hole and the unfenced backyard opened directly onto the golf course. It was dark on the golf course when the men went outside. Vierra thought the men went to the backyard for a drug sale, which they often did. About this time, around 9:00 p.m., a neighbor heard about three "small pops" in quick succession but thought it was firecrackers. Vierra did not hear anything. He testified that defendant returned alone to the house about 10 or 15 minutes after he and Ogden went to the backyard. Vierra asked defendant about buying drugs for a friend. Defendant acted "disoriented" and went to the bedroom he shared with Popeyus. Vierra heard defendant and Popeyus fighting for five or 10 minutes then saw Popeyus "storming" out of the

room looking "frantic." Popeyus yelled to her brother "We gotta go. We gotta go. We gotta get out of here." The two left immediately.

Defendant telephoned his friend Alexander Diaz around 9:30 p.m. Defendant asked for a ride, saying it was an emergency. Diaz picked up defendant in a Springtown shopping area. Defendant was "nervous" and "distraught." He would not tell Diaz what was going on. Defendant said he wanted to go to Oakland, then changed his mind and asked Diaz to take him to the Springtown house because he needed to get something. Diaz drove toward the house and defendant directed him to park away from the house and wait for him. Diaz waited six to 10 minutes and defendant returned to the car with "[a] bunch of bags and stuff." Defendant asked Diaz to "go down the street" or "around the corner somewhere" to "go into like a garbage can or something" and Diaz said "Forget about it. Let's just get out of here." Defendant said "Let's go to Oakland, then." As they drove to Oakland, defendant took the battery out of his cell phone. Diaz pressed defendant to tell him what happened and defendant said "My nigga tried to rob me. He was calling me names and all this shit."[4] Diaz asked who he was talking about and defendant said he "shot Lil Rob" (Ogden's nickname). Diaz did not understand defendant to mean that he shot Ogden for trying to rob him "that night" but that defendant was angry with Ogden for a variety of reasons. Diaz testified: Defendant "called [Ogden] a bitch; he fucking with his girl, just a whole bunch of rambling shit." Diaz continued to drive defendant to Oakland and dropped him off near the 98th Avenue freeway exit. As he exited the car, defendant gave Diaz $10 or $11 for gas, "some weed" and said: "You're my nigga."

Early the next morning, a jogger found Ogden's body on the golf course, in the fairway of the fourth hole, 300 to 400 feet from Vierra's back door. Ogden had been shot twice and died from his wounds. One bullet entered on the right side of his torso just below the armpit and punctured his heart and liver as the bullet travelled toward the left side of his body. Ogden also suffered a "through and through gunshot wound" to his left

[4] Defendant is White, as was Ogden. The slang term "nigga" means friend in some circles and appears to have that meaning here.

upper arm that entered on the outside of the arm and exited on the inside of the arm. No bullet casings were found near Ogden's body, which indicated the shooter likely used a revolver. The police found no signs of a struggle. A hat and cell phone were found near Ogden and a laptop bag was lying directly behind him with the strap wrapped around his right arm. In his pockets, Ogden had $60 in cash, a folding pocket knife, a screwdriver, sunglasses, headphones, a pipe like those used to smoke methamphetamine and a small plastic bag containing a residue that appeared to be methamphetamine. Ogden had a "high amount" of methamphetamine in his system when he died, the autopsy revealed.

Popeyus turned off her cell phone for two or three days after leaving Vierra's house. Within hours of turning it back on, she received calls and texts from defendant at a new phone number. A number of texts were admitted in evidence at trial. On January 10, 2013, defendant complained that Popeyus was "ignoring" him and demanded that she call him. The following day, defendant asked if there was "some guy that got you not answering for me" and, when she did not reply, texted that she was "a piece of shit" for "writ[ing] [him] off" and accused her of being a police informant. Defendant also said he "put it all on the line[,] sacrificed everything and you sacrificed nothing in return." Two days later, on January 13, defendant texted: "You[']re] a scarred ass mark bitch whoever has you acting like this is subject to consequences right along with you. I can give a fuck who it is . . . . Cause if you don't want to help me get out of this hole then you[']re going to help me dig deeper. This will all blow over soon and [I'll] be back. So play your games. You[']ve never met anyone like me [I] promis[e], you'll rather be a 5lbs Ethiopian sex slave. You asked for it though. Oooh I can't wait!" The next day, January 14, defendant texted: "Have you ever feared for the life of you and anybody else you love? Anybody else. Don[']t matter to me no more who it is just as long as it hurts u. I[']ll even let u live with it. That way u can know what it[']s like to not have what it is you care about most. So next time you[']re] around the ones you love cherish it. It might be the last time. After [I] reach out an[d] take their soul(s) then [I] bet you[']ll answer my call. But it will be too late. All you had to do is be solid. To me. Not lie and rat. Give the cops this

message. Let them protect you and your family. Protective custody. Nothing like p.c. huh. That[,]s what u get."

Popeyus had not given any information to the police about defendant until she received these threats. She went to the police on January 15. The police read the texts, ascertained defendant's cell phone number, and traced the phone's location to Springfield, Oregon where he was apprehended at his sister's house. When arrested, defendant's backpack contained a notebook with a drawing in the same style as drawings found in his bedroom at Vierra's house. The drawing shows a man pointing a revolver with a caption "What u know About Loyalty, honor and Respect?"

Defendant did not testify. The defense presented no witnesses but sought to establish various defenses through the cross-examination of prosecution witnesses. Defense counsel requested jury instructions on self-defense, imperfect self-defense and heat of passion and asserted, in closing argument, that the evidence did not prove murder but, at most, voluntary manslaughter.

Discussion

1. *Sufficient evidence supported a jury instruction on murder by lying in wait. Moreover, any error is harmless as an alternative ground supports the verdict of first degree murder.*

The jury was instructed that defendant was being "prosecuted for first degree murder under two theories: (1) the murder was willful, deliberate, and premeditated and (2) the murder was committed by lying in wait." (CALCRIM No. 521.) At trial, defendant objected that the theory of lying in wait was unsupported by the evidence. He renews that claim on appeal.

"A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof. [Citation.] We review the trial court's decision de novo. In so doing, we must determine whether there was indeed sufficient evidence to support the giving of a lying-in-wait instruction. Stated differently, we must determine whether a reasonable trier of fact could

have found beyond a reasonable doubt that defendant committed murder based on a lying-in-wait theory." (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.) "Murder by lying in wait requires (1) concealment of purpose, (2) a substantial period of watching and waiting for a favorable or opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at p. 1205.)

There was sufficient evidence of lying in wait to warrant an instruction. "The element of concealment is satisfied by a showing ' "that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." ' " (*People v. Sims* (1993) 5 Cal.4th 405, 432-433.) Concealment of purpose was evidenced here by defendant's assurance to Ogden on the telephone, hours before the shooting, that he just wanted to talk: "I'm not gonna fight with you bro." When Ogden arrived at Vierra's house, defendant came from his bedroom with a revolver concealed on his person and nodded nonthreateningly to Ogden, gesturing that Ogden follow him outside, which is where the men had previously transacted drug deals. Evidence that defendant watched and waited for an opportune time to act is shown by defendant walking with Ogden 300 to 400 feet from the house to the fairway of an unlit golf course. A surprise attack is strongly suggested by gunshots fired into Ogden's side, rather than the front of his body, and the lack of any defensive action or posture. When Ogden's body was found, the strap of his laptop bag was wrapped around his arm and a screwdriver and folded knife were in his pocket.

Even were it error to instruct the jury on the theory of murder by lying in wait, any error is harmless. "[I]nstruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict. . . . [T]he appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) This principle is founded on the recognition that "jurors are well equipped to analyze the evidence," making it unlikely

that a " 'jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.' " (*Griffin v. United States* (1991) 502 U.S. 46, 59-60.)

Nothing in the record here affirmatively demonstrates that the jury in fact found defendant guilty of first degree murder based upon the lying in wait theory, as opposed to the theory of premeditation and deliberation. The prosecutor argued both theories of murder but spent appreciably more time arguing premeditation and deliberation. Since there is sufficient evidence of defendant's premeditation and deliberation to sustain the first degree murder conviction on that theory, the conviction must be affirmed.

2. *The standard instructions on premeditated murder and provocation were legally correct.*

Defendant argues that the standard jury instructions on premeditated murder failed to adequately state that provocation may negate the necessary elements of premeditation, deliberateness and willfulness, thus reducing a murder from first to second degree. He contends the jury may have misapplied the provocation standard relevant to a reduction of murder to voluntary manslaughter, which requires not only that defendant subjectively act from provocation but that the provocation was sufficiently great that it would have caused an average person to act rashly.

At issue are several standard jury instructions. The jury was instructed on the elements of murder and voluntary manslaughter, and told that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter." (CALCRIM No. 522.) Murder is of the first degree if defendant "acted willfully, deliberately, and with premeditation. . . . [¶] . . . A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (CALCRIM No. 521.) "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his

reasoning or judgment; AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." (CALCRIM No. 570.)

Defendant maintains that these instructions may have led the jury to use the objective test of provocation needed to reduce murder to manslaughter (CALCRIM No. 570) instead of the subjective test relevant to a reduction of first to second degree murder (CALCRIM Nos. 521, 522). This same argument was made and rejected in *People v. Jones* (2014) 223 Cal.App.4th 995, 1001 (*Jones*). We agree with *Jones* that there was no instructional error in giving CALCRIM Nos. 521, 522 and 570. "CALCRIM Nos. 521 and 522, taken together, informed jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' [Citation] As the jury also was instructed, a reduction of murder to voluntary manslaughter requires more. It is here, and only here, that the jury is instructed that provocation alone is not enough for the reduction; the provocations must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment." (*Jones, supra,* at p. 1001; CALCRIM No. 570.) The instructions provide a correct statement of the law.

Defendant is effectively arguing, as did the defendant in *Jones,* "that a more specific instruction, actually a pinpoint instruction, should have been given informing the jury that the objective test did not apply to reduction of the degree of murder." (*Jones, supra,* 223 Cal.App.4th at p. 1001.) As in *Jones,* "defense counsel did not request such an instruction, and his failure to do so forfeits the claim on appeal." (*Ibid.*) The absence of a request is likely due to the fact that defendant never relied on provocation to reduce the degree of murder. Defendant asserts on appeal that the jury's choice lay between first degree murder and second degree murder, making instruction on the necessary provocation to reduce the degree of murder a critical aspect of the case. This was not, however, the defense at trial. Defense counsel did not argue for one degree of murder over another but argued that the evidence did not prove murder at all but, at most, voluntary manslaughter. Implicitly, the defense asked the jury to find that defendant acted

in self-defense, imperfect self-defense or was provoked by circumstances that would have caused a person of average disposition to act rashly and without due deliberation. Defense counsel never suggested that the evidence supported a verdict of second degree murder. The prosecutor did argue that "this case is really about whether this is second degree murder or first degree murder." In making that argument, the prosecutor never misstated the standard of provocation necessary to reduce first degree murder to second degree. The prosecutor's argument for first degree murder rested on evidence that defendant, while angry with Ogden, acted with calm deliberation as evidenced by defendant's insistence on meeting Ogden in person, silently nodding to Ogden at the house and walking him out to the golf course, and saying nothing to Vierra about the shooting when he returned to the house. The jury was properly instructed on the law.

3. *The victim's statements were properly admitted as his state of mind was relevant to defendant's claims of self-defense, imperfect self-defense and provocation.*

Defendant maintains the trial court abused its discretion in admitting Barham's testimony that Ogden told her, hours before he died, that defendant "was going to shoot him, but he had to go deal with it" and that "he was going to be sleeping with the ducks."

The prosecutor moved in limine to admit the hearsay statements as evidence of Ogden's state of mind to rebut expected claims that defendant killed Ogden in self-defense or upon a sudden quarrel. (Evid. Code, § 1250.) The prosecutor argued that Ogden's fear of defendant was inconsistent with any claim that he acted aggressively toward him. The court deferred ruling on the prosecutor's motion and related evidentiary issues until later in the trial. The court noted that a claim of self-defense or imperfect self-defense, if presented at trial, would impact the admissibility of Ogden's statements.

During trial, Diaz testified on direct examination that defendant, following the shooting, said Ogden "tried to rob me. He was calling me names and all this shit." Defense counsel made no objection to introduction of this testimony and, on cross-examination, elicited testimony that defendant was "distraught" and spoke of a "robbery." The next witness was the investigating officer. On cross-examination, defense counsel challenged the officer's opinion that there were no signs of a struggle on the golf

course where Ogden died. Counsel, referring to photos of the crime scene, said a hat and phone were "some distance" from Ogden's body and asked the officer if that did not constitute evidence of a struggle. The officer said no.

Jury instructions were discussed the following week, at which time defense counsel requested instruction on imperfect self-defense. Counsel argued sufficient evidence supported the instruction and pointed to Diaz's testimony that defendant said Ogden tried to rob him and called him names, Ogden had a knife in his pocket, and photos of the crime scene suggested a possible struggle. The prosecutor said he did not oppose an instruction on imperfect self-defense "if the defense wants to rely on that as a theory and they're offering that," and renewed his motion to admit the victim's statements expressing fear of defendant. Defense counsel objected that the statements were irrelevant and that the prosecution should not be allowed to rebut Diaz's testimony, which it presented. The court granted the prosecution's motion, finding the victim's statements relevant given the state of the evidence and defendant's claim of imperfect self-defense.

The victim's statements were properly admitted. "[E]vidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when" the declarant's state of mind "is itself an issue in the action" or "[t]he evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a).) Claims of self-defense and imperfect self-defense put the victim's state of mind at issue. (*People v. Spencer* (1969) 71 Cal.2d 933, 944-945; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1102-1103.) A victim's statement expressing fear of the defendant is admissible to show the victim was apprehensive and unlikely to be the aggressor. (*Spencer, supra,* at pp. 945-946.)

Defendant acknowledges these principles but maintains that the prosecution, not the defense, put the victim's state of mind at issue by introducing defendant's statements about the victim trying to rob him, as reported by Diaz. Defendant asserts: "A party cannot itself elicit evidence with minimal or no probative value and then seek to admit prejudicial testimony to rebut the inference suggested by the evidence a party itself

produced." This is not a fair characterization of the record. Diaz's testimony as a whole was clearly probative. It introduced defendant's admission that he shot Ogden and established that defendant fled the scene. Diaz's testimony that defendant said Ogden "tried to rob" him was also probative. One interpretation of the statement supports the prosecution's theory of premeditated murder, as defendant may have meant that he shot Ogden for reneging on his drug debt. The term "rob" is sometimes used for failure to pay a debt, as evidenced by Ogden's conversation with defendant hours before the shooting in which Ogden assured defendant he would pay him by saying "I'm not trying to rob you for your money." Alternatively, defendant could have meant that Ogden tried to forcefully take money or property from defendant when they were on the golf course. The claim of an actual robbery could have been a false justification defendant gave Diaz for shooting a mutual friend, as the prosecution argued, and, as such, showed a consciousness of guilt relevant to the prosecution's case. The defense used the statement to suggest that Ogden tried to rob defendant on the golf course and defendant shot him in defense or upon a sudden quarrel. The defense clearly put Ogden's state of mind at issue by asserting that Ogden was the aggressor and asking the jury to find that defendant acted in self-defense, imperfect self-defense or in the heat of passion. The prosecution was entitled to rebut those claims with evidence of Ogden's state of mind.

4. *The abstract of judgment must be amended to reduce the amount of a court facility fee and to add one additional day of custody credit.*

At sentencing, the court announced that it was imposing various fines and fees, including "$70 in felony conviction fee assessment and court fee assessment, court operations fee assessment." The amount stated was a cumulative total of two separate assessments: a $30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)) and a $40 court operations fee (§ 1465.8). The fact that two separate assessments were included in the stated amount of $70 was apparently misunderstood, as the abstract of judgment lists the $40 court operations fee but mistakenly lists $70—rather than $30—for the criminal conviction assessment. The Attorney General acknowledges that the abstract of judgment is incorrect and must be amended to reflect the correct amount.

The Attorney General also acknowledges that defendant served 798 days in jail prior to sentencing, not 797 as calculated by the trial court. "In all felony and misdemeanor convictions, . . . all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment." (§ 2900.5, subd. (a).) "Calculation of custody credit begins on the day of arrest and continues through the day of sentencing." (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) Defendant was arrested on January 15, 2013, and sentenced on March 23, 2015, which totals 798 days in custody. The court mistakenly excluded the day of defendant's arrest in its mathematical calculations. Defendant is entitled to one additional day of credit for time served.

Disposition

The trial court is directed to issue an amended abstract of judgment stating a criminal conviction assessment of $30 (Gov. Code, § 70373, subd. (a)(1)) and credit for time served of 798 days (§ 2900.5, subd. (a)) and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.